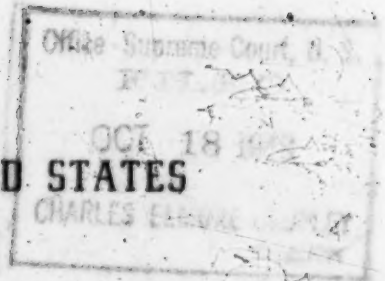


FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948



No. 360

FRED W. FINK,

Petitioner and Plaintiff-Respondent below,

vs.

SHEPARD STEAMSHIP COMPANY, A CORPORATION,

Respondent and Defendant-Appellant below

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF OREGON**

✓ **B. A. GREEN,**

1003 Corbett Building,

Portland, Oregon;

✓ **EDWIN D. HICKS,**

712 Failing Building,

Portland, Oregon;

THOMAS H. TONGUE, III,

712 Failing Building,

Portland, Oregon,

Attorneys for Petitioner.

INDEX

SUBJECT INDEX

	Page
Statement of the matter involved	1
Statement on jurisdiction	4
1. Statement of Federal rights relied upon	4
2. Federal question properly raised	5
3. Authorities supporting jurisdiction	7
4. Federal question is substantial	8
The question presented	14
Reasons relied upon for allowance of writ	14
Prayer for writ	19
Appendix A	20

INDEX OF CASE CITATIONS

<i>Aird v. Weyerhaeuser S. S. Co.</i> , 1948 A.M.C., p. 1315	12
<i>Atchison, T. & S. F. Co. v. Saxgn</i> , 284 U. S. 458, 459	8
<i>Bailey v. Central Vermont Ry.</i> , 319 U. S. 350	13
<i>Bennett v. Wilmore S. S. Corp.</i> (S. D. Tex.), 69 F. Sup. 427	12
<i>Brady v. Roosevelt S. S. Co.</i> , 317 U. S. 575, 581	6
<i>Caldarola v. Eckhart et al.</i> , 332 U. S. 155, 159	9, 14
<i>Casey v. American Export Lines</i> (J. Alfred C. Coxe, S.D.N.Y., December 17, 1947), unreported	13
<i>Cohen v. American Petroleum Transport Corp.</i> , 1947 A.M.C. 336	12
<i>Garrett v. Moore-McCormack Co.</i> , 317 U. S. 239, 244	7
<i>Gaynor v. Agwilines, Inc.</i> , 1948 A.M.C., p. 1322	12
<i>Guay v. American Presidents Line</i> (Calif.), 184 P. (2d) 539	12
<i>Healey v. Sprague S. S. Co.</i> , 76 N.Y.S. 2d, 564	12
<i>Hust v. Moore-McCormack Lines, Inc.</i> , 328 U. S. 707	2, 15
<i>Johnson v. Fleet Corp.</i> , 280 U. S. 320	18
<i>Koistinen v. American Export Lines, Inc.</i> , 1948 A.M.C. 1464	12
<i>Lavender v. Kurn</i> , 327 U. S. 645	14
<i>Little v. Moore-McCormack Lines, Inc.</i> , 1948 A.M.C. 1337	13

	Page
<i>McAllister v. Cosmopolitan Shipping Co., Inc.</i> , 1948 A.M.C. 1307	11
<i>Milheim v. Moffat Tunnel Improvement District</i> , 262 U. S. 710, 716-717	10
<i>Miller v. Wessel, DuVall & Co. (S.D.N.Y.)</i> , 1947 A.M.C., 429	12
<i>N.L.R.B. v. Hearst Publications</i> , 322 U. S. 111	14
<i>St. Louis I. M. & S. Ry. Co. v. McWhirter</i> , 229 U. S. 265, 275	8
<i>St. Louis; etc. v. Mills</i> , 271 U. S. 344	8
<i>Tennant v. Peoria & P. U. Ry. Co.</i> , 321 U. S. 29, 35	13
<i>U. S. v. Allegheny County</i> , 322 U. S. 174, 183	8
<i>U. S. v. Ansonia Brass, etc. Co.</i> , 218 U. S. 452, 462-3	8
<i>U. S. v. Pink</i> , 315 U. S. 203, 217	8
<i>U. S. v. Silk</i> , 331 U. S. 704	14
<i>Warren v. U. S.</i> , 75 F. Sup. 210, and 76 F. Sup. 735	12
<i>Yearsley v. W. A. Ross Construction Co.</i> , 309 U. S. 18	8

STATUTES CITED

Clarification Act (Public Law 17) (50 U.S.C. 1291, 57 Stat. 45)	2, 5
Federal Employers Liability Act (45 U.S.C. 51; 35 Stat. 65; 53 Stat. 1404)	8
Jones Act (46 U.S. C. 688, 38 Stat. 1185; 41 Stat. 1007)	1, 4
Suits in Admiralty Act (46 U.S.C. 742, 41 Stat. 525)	6

OTHER AUTHORITIES

Robertson & Kirkham, <i>Jurisdiction of the Supreme Court of the United States</i>	7
--	---

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 360

FRED W. FINK,

Petitioner and Plaintiff-Respondent below,

vs.

SHEPARD STEAMSHIP COMPANY, A CORPORATION,

Respondent and Defendant-Appellant below

PETITION FOR WRIT OF CERTIORARI

*To the Honorable Chief Justice and Associate Justices of
the Supreme Court of the United States:*

Your petitioner, Fred W. Fink, respectfully petitions this Honorable Court for a writ of certiorari to the Supreme Court of the State of Oregon.

Statement of the Matter Involved

This case involves an action by a seaman under the Jones Act (46 U. S. C. 688; 38 Stat. 1185; 41 Stat. 1007) against a steamship company for injuries received due to the negligent operation of a ship operated under a standard general agency agreement between the War Shipping Administra-

tion and the steamship company (Plf. Ex. 4; R. 106, 58). The case is identical with the case of *Hust v. Moore-McCormack Lines, Inc.*, 328 U. S. 707, except that the injuries in this case were received *after* the effective date of the Clarification Act, also known as Public Law 17 (50 U. S. C. 1291, 57 Stat. 45), while the injuries in the *Hust* case were received *prior* to the effective date of that Act.

On June 8, 1943, petitioner shipped out as an able-bodied seaman on the Liberty ship S. S. George Davidson, after signing the usual shipping articles (Def. Ex. F, R. 109, 211). As usual, the crew for the ship had been furnished by a Union through its hiring hall (R. 87), and there were in effect Union agreements between the steamship company and various Unions (Plf. Ex. 1, 5, 9 and 10, R. 87, 98, 106, 135, 136 and 240). Despite the general agency agreement under which the vessel was operated, these Union agreements continued in effect and the steamship company and Unions continued to negotiate for the settlement of disputes (R. 89, 90, 98).

At about 7:30 P. M., on August 2, 1943, while said vessel was at sea two days out of the port of Hobart, Tasmania, plaintiff was ordered by the boatswain on said vessel to dump overboard the contents of several garbage cans. Other seamen were then and there available to assist in said task, but were not ordered to do so. The ship's garbage was disposed of by lifting it over the rail of the ship and dumping it overboard. The garbage can in question weighed in excess of 150 pounds and was large and bulky in size, and there was a heavy sea running at the time and the deck was wet and the ship was rolling and pitching heavily. As plaintiff was lifting said can, a sea rolled the ship and threw him off balance and threw the can back against him and his back gave way, causing the injuries complained of (R. 178, 179).

In defense, respondent steamship company denied that it

was engaged in the operation of the vessel, that it was the employer of the petitioner, and that petitioner had the right to file this action under the Jones Act in a State Court. (Answer, par. I, II and VI, R. 3, 4). Respondent also denied any negligence (Answer, par. VII, R. 4).

By stipulation of the parties, the issue of whether plaintiff had the right to sue defendant under the Jones Act was tried before the Court, sitting without a jury, in advance of submitting to the jury the evidence on the question of negligence (R. 84). The trial Judge then rendered an opinion sustaining plaintiff's right to pursue this remedy (R. 173). The case was then submitted to the jury on the question of negligence, resulting in a verdict and judgment for plaintiff in the amount of \$9,000.00 (R. 5; 6). It has now been stipulated that there was sufficient evidence of damages and extent of injuries to sustain this verdict (R. 187).

On appeal by the respondent herein, the Supreme Court of the State of Oregon reversed this verdict and judgment (R. 10; 32). In reaching this conclusion it was held that although this Court had established in the *Hust* case that the crew of such a vessel were employees of the steamship company operating it under a general agency agreement (R. 14), the provisions of the Clarification Act must be construed as indicating an intention of Congress to treat such seamen as employees of the United States after the effective date of that Act, at least for the purpose of destroying the right of such seamen to bring actions under the Jones Act against the steamship companies (R. 27, 28).

Judgment was entered by the Supreme Court of the State of Oregon, based upon the above mentioned opinion, on April 6, 1948, (R. 35). A petition for rehearing was then filed (R. 35), and on May 18, 1948, the Supreme Court of the State of Oregon entered an order denying the petition for a rehearing (R. 41). On August 9, 1948, an order was entered herein extending the time within which to file the

petition for writ of certiorari to and including September 20, 1948 (R. 239). On September 16, 1948, a further extension was entered herein to and including October 18, 1948 (R. 239).

Statement on Jurisdiction

1. *Statement of Federal Rights Relied Upon.*

The grounds upon which it is claimed that a federal question is involved in this case are that your petitioner has from the institution of this case sought to specially claim and enforce a right or privilege under a statute of the United States, within the meaning of Section 237(b) of the Judicial Code, as amended, (28 U. S. C. 244(b)), and, in addition, that respondent has from the institution of this case sought to specially set up and claim a right, privilege or immunity under a statute of and also under a commission held and/or authority exercised under the United States, within the meaning of said Section 237(b).

As already stated, this case is an action by a seaman relying upon the rights and privileges provided under the Jones Act (46 U. S. C. 688, 38 Stat. 1185; 41 Stat. 1007), which provides that:

“Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply;”

As also stated above, it has been the defense of respondent herein throughout this case that it has a right, privilege or immunity from suit by virtue of the terms of this same statute and also by virtue of its authority and/or commission as a general agent of the War Shipping Administration

under the provisions of its general agency agreement (Plf. Ex. 4, R. 106, 58).

Additional grounds of jurisdiction result from the fact that both petitioner and respondent sought during the course of the proceedings in the courts of the State of Oregon to confirm the existence of the rights, privileges and immunities respectively claimed by them by reference to the provisions of the Clarification Act, Public Law 17 (50 U.S.C. App. Sec. 1291, 57 Stat. 45), and the Supreme Court of Oregon in its decision endeavored to interpret and construe the provisions of that federal statute. The principal provision of that Act in controversy is as follows:

Section 1(a): "Officers and members of the crews * * * employed on United States * * * vessels as employees of the United States through the War Shipping Administration shall; with respect to * * * (2) * * * injuries * * * or claims arising therefrom * * * have all of the rights * * * under law applicable to citizens of the United States employed as seamen on privately owned and operated vessels."

2. Federal Question Properly Raised.

The complaint filed by petitioner in the Circuit Court of the State of Oregon for Multnomah County states specifically that this action is brought under the Jones Act (First Amended Complaint, par. VI, R. 3). This fact was conceded by respondent (Answer, par. VI, R. 4). The Oregon Supreme Court also specifically recognized this fact in its decision (R. 11, 12).

With reference to Public Law 17, supra, while the pleadings make no specific reference to its provisions, the respondent, in its first assignment of error on appeal to the Supreme Court of the State of Oregon, raised the question of whether this action could be maintained because of the provisions of that statute (R. 42). It was also recognized.

by the Oregon Supreme Court in its decision that the defendant had asserted that the effect of the Clarification Act was to foreclose such an action and to remit such injured seaman to a suit against the United States under the Suits in Admiralty Act (46 U.S.C. 742, 41 Stat. 525) in the United States Federal Courts (R. 12). Moreover, the Oregon Supreme Court undertook to construe and interpret the effect of the Clarification Act upon the rights claimed by this petitioner under the Jones Act (R. 32). This determination necessarily involved the consideration of whether this statute created, destroyed or confirmed the existence of rights, privileges and immunities respectively claimed under the Jones Act by the petitioner and respondent in this case, as well as the question of whether Public Law 17 was sufficiently unambiguous to satisfy the rule established by this case in *Brady v. Roosevelt Steamship Co.*, 317 U. S. 575, 581, and in *Hust v. Moore-McCormack Lines, Inc.*, *supra*, at 722, to the effect that long established rights of seamen can only be destroyed by a clear expression of Congressional intent.

The claims by respondent to right, privilege or immunity by virtue of the terms of its general agency agreement with the War Shipping Administration were also not specifically referred to in the pleadings, nor in assignments of error on appeal. We submit, however, that such claims to rights, privileges or immunities were implicit in respondent's answer, denying that it was the employer of petitioner (Answer, par. II, R. 3). This position could, of course, be sustained only by reference to the provisions of the general agency agreement, which, according to defendant, constituted it as nothing more than an agent of the United States and precluded it from responsibility as employer of the seamen engaged pursuant to that agreement. The only question on this point is whether respondent's defense based on this agency agreement was a claim to right, privi-

lege or immunity under a law of or under a commission held and/or authority exercised under the United States, within the meaning of Section 237 (b) of the Judicial Code, *supra*, as discussed below.

3. *Authorities Supporting Jurisdiction.*

This Court has frequently found it necessary to review on certiorari the decisions of state courts in cases arising under the Federal Employers Liability Act and the Jones Act, in order to clarify the statutory tests of liability and to the end that these Acts may have uniform application. *Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States*, Sec. 344; *Garrett v. Moore-McCormack Co.*, 317 U. S. 239, 244.

It is to be noted that the Oregon Supreme Court not only recognized the existence of the Federal questions in this case (R. 12), but expressly based its decision upon a determination of such questions (R. 32). This determination was based both upon the construction and interpretation of provisions of the Jones Act and also of the provisions of the Clarification Act, adopted by Congress on March 24, 1943 (R. 12, 32).

These facts alone are sufficient to support the jurisdiction of this Court.

The determination by the Oregon Supreme Court was also based upon its construction of the general agency agreement (R. 12, 21), which forms the basis upon which respondent claims immunity.

All contracts with the United States are to be considered and construed in the light of the Federal statutes authorizing and limiting their execution and effect. It has been held by this Court that this principle applies to operating agreements between the United States and private steamship companies. *Brady v. Roosevelt S. S. Co.*, *supra*. It follows that since the general agency agreement in question

would directly affect rights of seamen under the Jones Act, the respondent, by claiming a right or immunity because of the general agency agreement, is also claiming a right, privilege or immunity under the provisions of the Jones Act itself.

It has been recognized that in actions under the Federal Employers Liability Act (45 U.S.C. 51; 35 Stat. 65; 53 Stat. 1404), upon which the Jones Act is based, the protection afforded by its provisions is fully as available to employers, under claim of Federal right or immunity, as are the benefits of its rights available to employees. *St. Louis I. M. & S. Ry. Co. v. McWhirter*, 229 U. S. 265, 275; *Atchison, T. & S. F. Co., v. Saxon*, 284 U. S. 458, 459. See also *St. Louis, etc., Ry. v. Mills*, 271 U. S. 344.

Moreover, this Court has specifically held that the claim to a right, privilege or immunity by virtue of a contract between the United States and a private corporation may properly be considered as a Federal question within the meaning of the Judicial Code, *U. S. v. Ansonia Brass, etc., Co.*, 218 U. S. 452, 462-3. See also *Yearstey v. W. A. Ross Construction Co.*, 309 U. S. 18; *U. S. v. Pink*, 317 U. S. 203, 217; *Carpenter v. Shaw*, 280 U. S. 363, and *U. S. v. Allegheny County*, 322 U. S. 174, 183.

4. Federal Question Is Substantial.

We submit that this case is not only one "where a state court has decided a Federal question of substance not theretofore determined by this Court", but is also one where a state court has decided such a question "in a way probably not in accordance with applicable decisions by this Court". (Supreme Court Rule 38, par. 5a). In addition, this is a case involving a question upon which one Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter. (Id., par. 5b).

This is clearly a case of first impression, so far as this Court is concerned. In the case of *Hust v. Moore McCormack Lines, Inc.*, *supra*, this Court specifically refrained from passing upon the application of the Clarification Act; *supra*, to cases involving injuries to seamen after the effective date of that Act.

Thus, it was held by this Court in the *Hust* case, at p. 727, as follows:

"We need not determine in this case whether prospectively the Clarification Act affected rights of the seamen against the operating agents and others, or simply made sure that his rights were enforceable against the government. We make no suggestion in that respect. For this case, on the facts, is not governed by the statute's prospective operation."

It was held by this Court in the *Hust* case, however, that seamen employed on ships operated under standard agency agreements with the War Shipping Administration are, for the purposes of the Jones Act, to be considered as employees of the steamship companies engaged as general agents under such agreements (*Id.*, pp. 723-725). This conclusion was later reaffirmed in this Court in the case of *Caldarola v. Eckhart et al.*, 332 U. S. 155, in which it was held, at p. 159, referring to the *Hust* case, that:

"We held there that under the agency contract the agent was the 'employer' of an injured person, as that term is used in the Jones Act, and a seaman could therefore bring the statutory action against such an 'employer'."

It follows that if such seamen are to be considered as employees of such general agents for the purposes of the Jones Act, then they have the right to sue such agents under the Jones Act in state courts, with right to trial by jury, unless the provisions of the Clarification Act de-

stroyed the status of such seamen as employees of such general agents for the purpose of pursuing that remedy.

For reasons hereinafter stated, it is submitted that in adopting the Clarification Act the Congress had no intent and did not effect any change whatever to change the status of seamen employed on ships operated under general agency agreements as employees of the private steamship companies or to destroy their remedies against such general agents under the Jones Act by proceedings in state courts with trial by jury.

Nevertheless, it was held by the Oregon Supreme Court that the effect of the Clarification Act was to treat such seamen as employees of the United States and to destroy the right of such seamen to bring actions under the Jones Act against such general agents in state courts with right of trial by jury (R. 28). Thus, the Oregon Supreme Court has decided a Federal question of importance to thousands of seamen employed on vessels operated under general agency agreements with the War Shipping Administration and which was expressly held open by this Court in its decision in the *Hust* case. In addition, and as hereinafter stated, it is submitted that the Oregon Supreme Court decided this question in a way probably not in accordance with applicable decisions by this Court. In any event, it is clear that this case involves a Federal question requiring analysis of Federal statutes and of decisions of this Court and exposition of the same before a proper decision can be reached. *Robertson and Kirkham, supra*, at p. 97; *Milheim v. Moffat Tunnel Improvement District*, 262 U. S. 710, 716-717.

In addition, as stated above, one Circuit Court of Appeals has rendered a decision upon the identical question involved in this case in conflict with the decision of another Circuit Court of Appeals on the same matter. Thus, the Circuit

Court of Appeals for the Second Circuit, in *McAllister v. Cosmopolitan Shipping Co., Inc.*, 1918 A. M. C. 1307, held, in an opinion by Justice Augustus N. Hand, that the right of such a seaman to sue the general agent under the Jones Act for injuries suffered subsequent to the effective date of the Clarification Act was not destroyed by that Act. In referring to the *Hust* case, it was held, at p. 1314, as follows:

"The opinion expressly disclaimed any intention of dealing with liability for prospective acts of negligence, but the theory of liability which it adopted seems to be equally applicable to such acts. *The Clarification Act, however, makes no reference to the liability of a general agent and we cannot see why it should be thought to eliminate such liability, if it existed. Moreover, it is to be noted that the government in its brief as *amicus curiae* makes no claim that the Clarification Act has any bearing on the plaintiff's right of recovery. We believe that the purpose of the Act was to clarify the right against the United States of seamen employed by the War Shipping Administration and not to disturb other rights of seamen against the general agents so far as they existed. The question whether, and how far, such other rights exist is, as we have already said, a matter for determination by the Supreme Court in dealing with the scope of the *Hust* decision.

"Accordingly we must respectfully differ with the opinion of the Supreme Court of Oregon in *Fink v. Shepard S.S. Co.*, 1948 A. M. C. 585, 192 P. (2d) 258, rehearing denied, 1948 A. M. C. 1169, 193 P. (2d) 537, which held that the Clarification Act prevents a suit against the agent. We are, therefore, remitted to the theory which we have already expressed, that the *Hust* decision governs the situation here and that its reasoning, in spite of any limitation in the opinion of the issues directly passed upon, points toward liability of the general agent under the Jones Act in the present case."

On the other hand, the Circuit Court of Appeals for the Third Circuit, in *Gaynor v. Aguilines, Inc.*, 1948 A. M. C. p. 1322, reached a result which may be considered as contrary to the decision in the *McAllister* case, although the decision would appear to be distinguishable upon the ground that the shipping articles provided that the crew were employees of the United States, and upon the further ground that it involved an action to recover wages, maintenance and cure and the value of clothing and personal effects, rather than an action in tort for personal injuries which, under the Jones Act, is available against the employer of the seaman. See also the decision by the same Court in *Aird v. Weyerhaeuser S.S. Co.*, 1948 A. M. C. p. 1315, involving issues similar to those in the *Gaynor* case.

It also appears from the following cases that probably the majority of decisions supports the position of the petitioner and is opposed to the decision appealed from this case:

McAllister v. Cosmopolitan Shipping Co., Inc., *supra*:
Warren v. U. S., 75 F. Sup. 210; and 76 F. Sup. 735
 (S. D. N. Y., J. Medina);

Healey v. Sprague S.S. Co., 76 N. Y. S. 2d, 564;

Guay v. American Presidents Line (Calif.), 184 P.
 (2d) 539;

Miller v. Wessel, DuVall and Co. (S. D. N. Y.), 1947
 A. M. C., 429;

Bennett v. Wilmore S. S. Corp. (S. D. Tex.), 69 F.
 Sup. 427;

Koistinen v. American Export Lines, Inc., 1948 A. M. C.
 1464;

Cohen v. American Petroleum Transport Corp., 1947
 A. M. C. 336;

Little v. Moore-McCormack Lines, Inc., 1948 A. M. C. 1337;

Casey v. American Export Lines (J. Alfred C. Coxe, S. D. N. Y. Dec. 17, 1947), unreported.

The question involved in this case is also one of great public importance. If the decision of the Oregon Supreme Court is correct, thousands of American seamen will be deprived of their rights to bring suits in state courts under the Jones Act, with the guaranty of trial by jury, against the large proportion of steamship companies now operating under standard agency agreements. Even if the only Federal right claimed by this petitioner under the Jones Act were the right to jury trial in a state court, we submit that the loss of this right alone raises a Federal question of substantial importance, since it has been recognized by this Court that the right to jury trial is "part and parcel" of the remedy afforded under the Jones Act and that to deprive workers of the benefit of a jury trial is to take away "a goodly portion of the relief which Congress has afforded them." *Bailey v. Central Vermont Ry.*, 319 U. S. 350. See also *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 35. We also submit that there are important reasons of public policy at this time in view of the large number of contracts now outstanding between the Federal government and private corporations and the extreme importance of many of the questions now arising under such contracts to support the position that this Court should exercise its discretion to review by writ of certiorari the decision of any state Supreme Court which undertakes to pass upon the validity of any right or immunity claimed by a private corporation by virtue of the provisions of a contract with the Federal government, particularly where the contract designated the company to be an agent of the government and is a standard

form governing the rights of thousands of seamen engaged on hundreds of ships.

The Question Presented

The ultimate and primary question presented to the Court in this case is whether a seaman employed on a ship operated under the standard form of general agency agreement between the War Shipping Administration and various steamship companies and who was injured subsequent to the effective date of the Clarification Act, *supra*, has a cause of action which he may pursue in a state court under the Jones Act against such a steamship Company as his employer for injuries received due to the negligent operation of the ship.

Reasons Relied upon for Allowance of Writ

In addition to the foregoing statement supporting the jurisdiction of this Court, petitioner submits the following reasons why the Supreme Court of the State of Oregon erred in its decision and why the petition for writ of certiorari in this case should be granted by this Court:

1. This Court, in the case of *Hust v. Moore-McCormack Lines, Inc., supra*, expressly held that seamen employed on ships operated under standard general agency agreements are still employees of the general agents for the purposes of the Jones Act. The decision in the *Hust* case on this point was confirmed by this Court in *Caldarola v. Eckart*, 332 U. S. 155, 159. This result is also in accord with other decisions by this Court: *N. L. R. B. v. Hearst Publications*, 322 U. S. 111; *U. S. v. Silk*; 331 U. S. 704; *Lavender v. Kurn*, 327 U. S. 645. This result is also supported by other evidence in the record of this case, which is identical, for all practical purposes, with the record in the *Hust* case, and which includes Union contracts between the steamship

company and the Unions representing the petitioner, other seamen and employees of such ships, and under which the companies were designated as the employer and retained the right to hire and fire (Plf. Ex. 1, 5, 9, 10 and 12, R. 87, 98, 106, 135, 136, 166 and 240. See also R. 11); evidence that during the War these agreements were expressly continued with the approval of the War Shipping Administration and that steamship companies continued to negotiate grievances and act otherwise as employers of the crew and were recognized as such by the National War Labor Board and National Labor Relations Board (Def. Ex. C, R. 107, R. 188; R. 89, 90 and 98; Plf. Ex. 12 and 13 (R. 166, 240). See also provisions of the general agency agreement, (Plf. Ex. 4, R. 106, 58) including requirements that the crews were still to be procured by the steamship companies in the usual manner, (R. 59) it being held in the *Hust* case (pp. 730 to 733) that such agreements continued the employer and employee relationship between the seamen and such companies.

2. The Oregon Supreme Court held that under the Clarification Act the exclusive remedy of injured seamen employed on vessels owned by the United States and operated under standard general agency agreements and injured after the effective date of that Act is to sue the United States under the Suits in Admiralty Act. It necessarily follows that all of the former rights of such seamen to sue their employers, the steamship companies engaged as general agents under such agreements, in state courts under the Jones Act, with the right of trial by jury, as established by this Court in *Hust v. Moore-McCormack Lines, Inc.*, 328 U. S. 707, have been destroyed by implication by virtue of the Clarification Act. In so holding, the Oregon Supreme Court failed to follow the rule established by this Court in *Brady v. Roosevelt Steamship Co.*, *supra*, at 580, 581, and in the *Hust* case, *supra*, at 722, wherein it was held that although "Congress

could authorize so vast a disturbance to settle rights by clear and unequivocal command . . . it is not permissible to find one by implication."

3. Before such a "clear and unequivocal command" and manifestation of Congressional intent can be found to provide an exclusive remedy by such seamen against the United States and to destroy the rights of such seamen against private steamship companies, it must at least be clear that Congress understood that at the time of enacting the Clarification Act and by virtue of the terms of such general agency agreements seamen employed on such vessels had already become employees of the United States, since if Congress understood that such seamen were still employees of the general agents or was in doubt as to whether such seamen were employees of the United States or of the general agents, it would have been necessary to amend or repeal the Jones Act before the rights of such employees to sue their employers, the general agents, could have been destroyed. In the absence of such amendment or repeal, the provisions of the Clarification Act providing that such seamen may bring suit against the United States must be considered as an *additional* remedy, rather than an exclusive remedy, under the rule that rights under the Jones Act cannot be destroyed by implication or otherwise than by "clear and unequivocal command."

4. This Court, in the *Hust* case, has expressly held that Congress was at least uncertain as to the status of such seamen (Op. pp. 730 and 733); that one of the purposes of the Clarification Act was to save seamen's rights and remedies rather than to take them away (Op. pp. 726 and 733); and that the Clarification Act was passed only "to make certain that seamen would have *at least* the remedy provided by the Suits in Admiralty Act (Op. p. 727). These pronouncements by this Court foreclose any holding that

Congress either understood that such seamen had become employees of the United States or that in adopting the Clarification Act Congress expressed any "clear and unequivocal command" to destroy injured seamen's rights under the Jones Act to sue private steamship companies engaged as general agents.

5. The retroactive provisions of the Clarification Act providing for an election of remedies prior to the effective date of that Act, do not indicate an intent to limit seamen after the effective date of the Clarification Act to suits against the United States under the Suits in Admiralty Act, but reveal no more than an intent to clarify and, if necessary, to extend, retroactively, the remedy of seamen under certain circumstances to bring proceedings against the United States under the Suits in Admiralty Act. This is in accord with the "conserving intent of Congress", as held in the *Hust* case (pp. 729; 733). At the least, such retroactive provisions cannot be regarded as a "clear and unequivocal command" to destroy, after the effective date of that Act, the rights of seamen to bring proceedings under the Jones Act against steamship companies engaged as general agents.

6. Likewise, the provisions of the Clarification Act that claims for personal injuries by such seamen "shall" be enforced under the Suits in Admiralty Act was not intended to destroy the rights of such seamen to proceed against such steamship companies under the Jones Act, as held by the Oregon Supreme Court (R. 29), but was intended to provide only that "the claims would be enforceable by suit against the United States only under the Suits in Admiralty Act" (H. R. 2572, p. 29, 77th Congress, 2nd Session). It is thus apparent that this provision was only intended to deal with remedies of seamen against the United States; that it was in that sense alone that the remedy under the

Suits in Admiralty Act was meant to be exclusive, and that it was not intended to deal with any remedies that seamen might have against private steamship companies. Similarly, the decision not to allow a jury trial in such proceedings against the United States does not indicate an intention to prohibit actions against private steamship companies, with attendant jury trials, as held by the Oregon Supreme Court (R. 29). Instead, the decision to exclude jury trials was based upon the ground that jury trials should not be allowed in proceedings against the United States (H. R. 7424, Hearings, p. 33, 77th Congress, 2nd Session). Therefore, the fact that jury trials were not provided for under the Clarification Act in proceedings by seamen against the Government does not indicate a "clear and unequivocal" Congressional intent to destroy the right of seamen to bring actions under the Jones Act against steamship companies engaged as general agents (See also H. R. 2572, *supra*, p. 14).

7. It has been conceded by the attorneys for the very administrative agency of the Government which drafted the Clarification Act and sponsored its passage that this statute, far from having any such far-reaching intent, was limited to rights of such seamen against the Government, did nothing to affect any rights or remedies that they may have had against the general agents, and, therefore, "has no bearing on the present case". (See Op. Oregon Sup. Ct., R. 32. See also excerpt from Brief of the United States as *Amicus Curiae*, Appendix A).

8. Viewed as a whole, the decision of the Oregon Supreme Court represents but another attempt to resurrect the doctrine of the *Lustgarten* case, *Johnson v. Fleet Corp.*, 280 U. S. 320, which limited the remedy of such seamen to proceedings under the Suits in Admiralty Act against the Government—a doctrine first rejected in *Brady v. Roosevelt*

Steamship Co., supra, and again rejected in *Hust v. Moore McCormack Lines, Inc., supra*.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the Supreme Court of the State of Oregon, commanding said Court to certify to this Court a complete transcript of the record and of all proceedings of said Supreme Court of the State of Oregon had in said cause, to the end that this cause may be reviewed and determined by this Court, as provided for by statutes of the United States; that judgment of the Supreme Court of the State of Oregon be reversed, and for such further relief as to this Court may seem proper.

Dated October 11, 1948.

B. A. GREEN,
EDWIN D. HICKS,
THOMAS H. TONGUE III,
Attorneys for Petitioner.

APPENDIX A

Excerpt From Page 51 of Brief for the United States
As Amicus Curiae

IN THE SUPREME COURT OF THE STATE OF OREGON

SHEPARD STEAMSHIP COMPANY, *Appellant,*

v.

FRED W. FINK, *Respondent*

On Appeal from a Judgment of the Circuit Court for
Multnomah County, Oregon

Hon. Walter L. Toozé, Judge

Brief for the United States as Amicus Curiae

“It is clear that the sole intended effect of the Clarification Act was to remove all impediments to War Shipping Administration seamen's asserting their rights against the United States under the Jones Act and preserving their rights under the Social Security Acts. In return the Act discontinued their rights under the U. S. Employees' Compensation and Civil Service Retirement Acts, saving, however, such claims and clauses of action as had theretofore accrued under those acts. We submit, therefore, that the Clarification Act has no bearing on the present case.”

Respectfully submitted,

H. G. MORISON,
Acting Assistant Attorney General,

HENRY L. HESS,

United States Attorney,

J. FRANK STALEY,

LEAVENWORTH COLBY,

Special Assistants to the Attorney General, Admiralty and Shipping Section, Department of Justice,

Attorneys for the United States.

January 1948.

(8889)